In The

Supreme Court of the United States

October Term, 1978

No. 78-1007

H. EARL FULLILOVE, FRED MUNDER, JEREMIAH BURNS, JOSEPH CLARKE, GERARD A. NEUMAN, WILLIAM C. FINNERAN, JR., PETER J. BRENNAN, THOMAS CLARKSON, CONRAD OLSEN, JOSEPH DeVITTA as Trustees of THE NEW YORK BUILDING AND CONSTRUCTION INDUSTRY BOARD OF URBAN AFFAIRS FUND; ARTHUR GAFFNEY as President of the BUILDING TRADES EMPLOYERS ASSOCIATION, GENERAL CONTRACTORS ASSOCIATION OF NEW YORK, INC., GENERAL BUILDING CONTRACTORS OF NEW YORK STATE, INC., and SHORE AIR-CONDITIONING CO., INC.,

Petitioners,

-against-

JUANITA KREPS, SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA, THE STATE OF NEW YORK and THE CITY OF NEW YORK, THE BOARD OF HIGHER EDUCATION and THE HEALTH & HOSPITAL CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In The

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No.

H. EARL FULLILOVE, FRED MUNDER, JEREMIAH BURNS, JOSEPH CLARKE, GERARD A. NEUMAN, WILLIAM C. FINNERAN, JR., PETER J. BRENNAN, THOMAS CLARKSON, CONRAD OLSEN, JOSEPH DeVITTA as Trustees of THE NEW YORK BUILDING AND CONSTRUCTION INDUSTRY BOARD OF URBAN AFFAIRS FUND; ARTHUR GAFFNEY as President of the BUILDING TRADES EMPLOYERS ASSOCIATION, GENERAL CONTRACTORS ASSOCIATION OF NEW YORK, INC., GENERAL BUILDING CONTRACTORS OF NEW YORK STATE, INC., and SHORE AIR-CONDITIONING CO., INC.,

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit in this case.

THE OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit,[1] not yet officially reported, appears in the Appendix hereto (23a). It affirms the decision of the United States District Court for the Southern District of New York (Werker, J.), reported at 443 F. Supp. 253 (S.D.N.Y. 1977), and appended hereto (1a) which upheld the constitutionality of Section 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. §6705(f)(2) (hereinafter "PWEA" or the "Act"), which provides for a set-aside of 10% participation in programs under the Act for minority business enterprises as defined therein.

JURISDICTION

This petition for certiorari has been filed within 90 days of the entry of judgment of the Court of Appeals on September 22, 1978. This Court's jurisdiction to review the judgment below is invoked under 62 Stat. 928, 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether Congress' requirement that 10% of federal grants for local public works projects be set aside for minority business enterprises is constitutionally permissible under the Due Process or Equal Protection Clauses of the federal Constitution.

2. Whether the minority set-aside is in violation of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d *et seq.*

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1. Oakes, Circuit Judge; Blumenfeld, Senior District Judge for the District of Connecticut; Mehrtens, Senior District Judge for the Southern District of Florida.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V of the United States Constitution provides:

> "No person shall be . . . deprived of life, liberty, or property, without due process of law . . ."

Amendment XIV, Section 1 of the United States Constitution provides:

> "No State shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES INVOLVED

Section 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. §6705(f)(2) provides for the 10% minority business set-aside:

> "2. Except to the extent that the Secretary determines otherwise, no grant shall be made under this Act for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term 'minority business enterprise' means a business at least 50 percent of which is owned by minority group members or, in the case of a publicly owned business, at least 51 percent of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts."

The provisions of the PWEA are appended hereto (42a).

Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d provides:

> "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."

STATEMENT OF THE CASE

A. The Proceedings

This action was commenced on November 30, 1977. The complaint sought, along with other relief, a judgment declaring that portion of the federally enacted Public Works Employment Act of 1977, which provides for an appropriation set-aside to minorities, contrary to statute and unconstitutional. Petitioners moved for a temporary restraining order, which was denied by the District Court (Hon. Henry F. Werker, Judge). The Court thereupon consolidated petitioners' application for a preliminary injunction with a trial on the merits, which was held on December 2, 1977.

The trial consumed one day, during the course of which the District Court heard three witnesses and received eleven exhibits. On December 19, 1977, the District Court issued its Opinion and Order upholding the constitutionality and legality of the applicable portion of the statute.

On September 22, 1978, the Court of Appeals for the Second Circuit affirmed the decision below.

B. The Facts

The petitioners are comprised of various individuals and contractor groups which perform both general contracting and specialty subcontracting work on various construction projects including those let by the State and City of New York and their various agencies.

Petitioners challenge the constitutionality and compliance with Title VI of the Civil Rights Act of 1964, of Section 103(f)(2) of the Public Works Employment Act of 1977 (PWEA), 42 U.S.C. §6705(f)(2), which is set forth at p.43a, *supra.*

The PWEA was enacted by Congress on May 13, 1977. Purportedly, it was intended to correct certain inadequacies in the Local Public Works Capital Development and Investment Act of 1976, 90 Stat. 999-1012, Pub. L. No. 94-369 (hereinafter "LPWA") and to increase the funding of the LPWA by an additional four billion dollars.

The intentions of Congress in enacting the LPWA, as reported by the Committee on Public Works and Transportation of the House of Representatives, were twofold:

(1) to alleviate the problems of national unemployment, and;

(2) to stimulate the national economy by assisting state and local governments to build badly needed public facilities.

The LPWA charged the Economic Development Administration ("EDA"), under the direction of the Secretary of Commerce, with the task of processing applications from the various state and local governments seeking assistance thereunder for local public works projects (designated as "Round I").

When it became clear that the LPWA was not adequately fulfilling the intentions of Congress, public hearings were held by the House Subcommittee on Economic Development, which contained certain objectives to be met in the next round of funding ("Round II"). That same subcommittee thereafter recommended that H.R. 11, the House version of PWEA, be enacted as reported and concluded that the amendments made by the bill to the LPWA would meet those objectives mentioned above. This report was issued on February 16, 1977. On February 24, 1977, on the floor of the House, during the debate on H.R. 11, an amendment was offered by Representative Parren Mitchell (D. Md.), which, with slight modification, was approved and eventually enacted as Section 103(f)(2), 42 U.S.C. §6705(f)(2), and is now known as the Minority Business Enterprise ("MBE") provision. This provision had not been previously considered by any House committee or subcommittee, and after brief debate following its introduction, the amendment was approved on the floor of the House.

The final version of the PWEA, containing the MBE provision, was enacted by Congress on May 13, 1977.

Pursuant to the terms of the PWEA, the local grantees, including the City and State of New York have received federal funding for various municipal projects. These projects have been and continue to be let under contacts, the terms of which include the various MBE requirements.

THE REASONS FOR GRANTING A WRIT

I.

THE QUESTION OF MINORITY SET-ASIDES IN FEDERALLY FUNDED PROJECTS IS A TOPICAL ISSUE OF PERVASIVE AND SUBSTANTIAL PROPORTIONS.

The issue of the constitutionality of congressional action in formulating this minority set-aside was before this Court in *Associated General Contractors of California v. Secretary of Commerce,* 441 F. Supp. 955 (C.D. Cal. 1977), *vacated and remanded,* 98 S. Ct. 3132 (1978) which was remanded to the lower court for a determination on the question of mootness. The lower court has since determined that the matter has not been mooted. Accordingly, a notice of appeal to this Court under 28 U.S.C. §.252 has been filed by the City of Los Angeles. There the lower court had found the set-aside provision unconstitutional and invalid under the provisions of Title VI. Similarly in *Montana Contractors' Ass'n v. Secretary of Commerce,* CV 77-62-M (D. Mont. filed November 24, 1978) it is anticipated that the Secretary of Commerce will file a direct appeal to this Court from a determination of the lower court's holding the set-aside provision unconstitutional. A third district court has found the statute in issue to be unconstitutional as applied. *Wright Farms Constr., Inc. v. Kreps,* 444 F. Supp. 1023 (D. Vt. 1977).

The permissible scope of federal legislation which effectuates broad based social policies through the use of racial classifications is a question the parameters of which must be clearly delineated in the wake of *Regents of the University of California v. Bakke,* 98 S. Ct. 2733 (1978) (hereinafter *"Bakke"*). There, this Court was confronted with the issue of voluntary quotas imposed by a state medical school to alleviate a discrepancy in enrollment it perceived between non-minority and minority students. In the instant case, the question transcends

the imposition of voluntary quotas and goes directly to the competence of the congressional branch of government to formulate a quota system respecting minority involvement when federal funds are utilized in municipal construction projects.

This Court in *Bakke* questioned the imposition of affirmative action remedies in the absence of "a judicial determination of constitutional violation as a predicate for the formulation of a remedial classification." *Regents of the University of California v. Bakke, supra,* 98 S. Ct. at 2754. The Court likewise could uphold racial preferences "where a legislative or administrative body charged with the responsibility made determinations of past discrimination . . ." *Id.* The instant case presents squarely the question of the propriety of Congress to act in fashioning remedies which involve what might be deemed invidious racial classifications. To what extent and in what manner Congress, as a branch of government, can act in such a situation is a question of paramount importance. If congressional action and the ability to obtain federal funding can be conditioned on the imposition of racial classifications, it is of primary constitutional import that Congress satisfy those precise constitutional safeguards formulated by this Court to test legislative action in the area of such classifications.

The instant case involves the precise issue of the standards to be complied with when Congress acts in this area. The cases are legion in formulating standards of procedural due process to guide the courts in all areas, including race discrimination cases. The standards to be followed by Congress or any legislative body in formulating precisely the same remedies are anything but clear. The lower court in the instant case abandoned the strict scrutiny test in favor of a test of "fundamental fairness" (37a). The Court in *Bakke* spoke both in terms of the strict scrutiny test to be applied to all racial classifications, *Regents of the University of California v. Bakke, supra,* 98 S. Ct. at 2753 (Powell opinion) and a test formulated to measure classifications based on race which were formulated to rectify instances of past discrimination. *Id.* at 2787 (Brennan opinion).

This Court has recognized the need for legislative determinations in the area of race discrimination. *Id.* at 2757-58. It is of paramount interest that the tests of legislative action be precisely formulated so that the action of the legislative bodies in so delicate an area can be accurately measured. The instant case calls into question the actions of Congress in formulating a nationwide racial classification where the congressional record is devoid of any findings of discrimination in the construction industry and utterly devoid of any legislative inquiry in the area of alternative means involving less discriminatory methods. *San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1, 16-17 (1973). It accordingly involves the scope of judicial inquiry into acts of Congress involving due process and equal protection classifications and the deference, if any, accorded Congress when it imposes such classifications. Since Congress has undertaken to act affirmatively in the area of civil rights, the general welfare requires that Congress not be used as an instrument of discrimination.

II.

THE DECISION BELOW IS IN CONFLICT IN PRINCIPLE WITH THIS COURT'S DECISION IN *BAKKE* AND RAISES SIGNIFICANT QUESTIONS OF CONSTITUTIONAL AND FEDERAL LAW NOT DECIDED THEREIN.

A. Least Discriminatory Means Available

While completely ignoring the two prong directives that this Court established in *Loving v. Virginia,* 388 U.S. 1, 11 (1967) and *Dunn v. Blumstein,* 405 U.S. 330, 342-43 (1972), that when a classification is based upon race, it must be shown to be necessary *and* the least discriminatory means available to the accomplishment of a valid state objective, the Court of Appeals paid mere lip service to Mr. Justice Powell's formulation in *Bakke* that such racial classification must be *precisely tailored* and work the *least* harm possible to innocent persons. *Regents*

of the University of California v. Bakke, supra, 98 S. Ct. at 2753, 2758. Rather, the Court of Appeals in this case merely substituted its judgment in place and stead of the appropriate standard and found that so long as the remedies based upon the classification are "appropriately drawn", and do not exceed "fundamental fairness", such reverse discrimination will be sustained (36a-37a). This novel Court of Appeals' fashioned test does not even subject the classification to the more relaxed standard as expressed in Mr. Justice Brennan's opinion in *Bakke,* that not only must such remedy be substantially related to achievement of important governmental objectives, but it also must not stigmatize any group or single out those least represented in the political process to bear the brunt of the benign program.[2] *Regents of the University of California v. Bakke, supra,* 98 S. Ct. at 2784-85. The stigmatization in the case at bar is obvious. Similar to the special admission program utilized in *Bakke,* those contractors who do not fit within the select MBE category are never afforded a chance to compete for the special set-aside monies, no matter what the quality of their work product or the extent of their underbid of an MBE for a public work project. *(See, e.g., Regents of the University of California v. Bakke, supra,* 98 S. Ct. at 2764.) So, for example, a small business owned perhaps by a Caucasian immigrant, which is every bit as disadvantaged as a similarly situated MBE, is, by operation of the PWEA, excluded from obtaining at least 10% of the construction work funded under the Act. It is this very portion of the work which is preempted under the Act that such

2. In fact, the Brennan position even acknowledged that the least onerous alternative test is still viable if "fundamental rights" are restricted. *Regents of the University of California v. Bakke, supra,* 98 S. Ct. at 2782. In *Bakke,* however, it was noted that education was not afforded implicit or explicit protection under the Constitution, and accordingly no fundamental right involved. *Id.* at 2783 *citing San Antonio Independent School Dist. v. Rodriguez,* 411 U.S. 1, 29-36 (1973). It is undeniable, however, that at issue in the instant petition is the right to work which this Court has traditionally found to be a fundamental right. Slaughter House Cases, 16 Wall. 36 (1872).

a disadvantaged non-MBE is most likely to strive to obtain due to his limited size and capabilities. Conversely, similar to those racially preferred students in *Bakke,* the preferred minority business enterprises can compete for the full extent of the appropriated monies. The stigma is not one of mere semantics where a disregard of individual rights due to a person's color is sanctioned by the Congress of the United States.

If indeed the least onerous alternative requirement of the two prong test utilized in legislative classifications based upon race is to be abandoned in favor of either the Brennan position or the Court of Appeals' designed test, it should take place only at the behest and with the express sanction of this Court.

B. Prior Discrimination and Congressional Findings

This Court in *Bakke* left unresolved whether in fact race conscious remedies were permissible in the absence of express findings of past discrimination or discriminatory impact. While Justice Brennan concluded that such findings were not a prerequisite, Justice Powell's opinion stated that benign classifications are invalid in the absence of detailed legislative, judicial or administrative consideration found in the record, of prior discrimination with a consequent definition of the extent of injury caused by such discrimination. *Regents of the University of California v. Bakke, supra,* 98 S. Ct. at 2789 (Brennan findings); *id.* at 2757, 2755 n. 41 (Powell opinion). Here, the Court of Appeals, although reaching the obvious conclusion that legislative consideration of the MBE amendment was indeed "sparse", relied upon its sponsor's off the cuff remarks in concluding that the construction industry had been guilty of past discrimination (33a-34a). These scant remarks, characterized by one court as the mere debate rhetoric of a partisan, *Associated General Contractors of California v. Secretary of Commerce,* 441 F. Supp. 955, 969 (C.D. Cal. 1977), *vacated and remanded,* 98 S. Ct. 3132 (1978), *on remand,* ____F. Supp.____(C.D. Cal. 1978), coupled with the Court of Appeals'

completely unsupportable statement that the lack of congressional discussion was understandable in light of "the knowledge of the congressmen concerning the well-established history of past discrimination in the construction industry" (34a n.10), formed the basis for the upholding of this wholesale indictment of the construction industry. The Court of Appeals' analysis of the record thus presumed the very fact in issue, aided only by the unexpressed mental processes of Congress.

Moreover, although alluding to that portion of Justice Powell's opinion which noted a "special competence" accorded Congress where it sought to abolish the badges and incidents of slavery either by broadening such fundamental rights as voting, [*Katzenbach v. Morgan,* 384 U.S. 641 (1966)], or by prohibiting private discrimination [*Jones v. Alfred H. Mayer Co.,* 392 U.S. 409 (1968)],[3] the Court of Appeals failed to recognize that legislation which is based upon racial classification does not warrant that degree of judicial restraint and/or deference as it does when its goal is to afford equality. In fact, this Court has not yet addressed the issue of the proper standard of judicial review where legislation, albeit benign, classifies, discriminates and excludes from participation a segment of the population based upon race. As the benign discriminatory purposes of the set-aside in appropriations become the ever-increasing topic of the future, it becomes imperative for this Court to define the parameters of judicial review.

C. The MBE Amendment's Conflict with Title VI of the Civil Rights Act of 1964.

In addition to the constitutional shortcomings of this expenditure program, the MBE provision in its express terms represents a patent conflict with the clear and explicit provisions of Title VI of the Civil Rights Act of 19[illegible], Section 601, 42 U.S.C. §2000d. The two congressional enactments represent

3. *See Regents of the University of California v. Bakke, supra,* 98 S. Ct. at 2755 n. 41.

statements of congressional policy which by their terms, are contradictory. When national policy objectives are fully understood, it is clear that the congressional mandate embodied in Title VI requires that the race quota embodied in the MBE provision be invalidated as a "flagrant violation of both the congressional intent and national policy" represented by the Civil Rights Act, *Associated General Contractors of California v. Secretary of Commerce,* 441 F. Supp. 955 (C.D. Cal. 1977). The circuit court, in its decision, failed to even consider the Title VI violation.

CONCLUSION

The petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Dated: Garden City, New York
December 18, 1978

Respectfully submitted,

s/ Robert G. Benisch
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APPENDIX

DECISION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED DECEMBER 19, 1977 (WERKER, J.)

H. Earl FULLILOVE, Fred Munder, Jeremiah Burns, Joseph Clarke, Gerard A. Neuman, William C. Finneran, Jr., Peter J. Brennan, Thomas Clarkson, Conrad Olsen, Joseph DeVitta, as Trustees of the New York Building and Construction Industry Board of Urban Affairs Fund, Arthur Gaffney as President of the Building Trades Employers Association General Contractors Association of New York, Inc., General Building Contractors of New York State, Inc., and Shore Air-Conditioning Co., Inc., Plaintiffs,

v.

Juanita KREPS, Secretary of Commerce of the United States of America, the State of New York, the City of New York, Board of Higher Education and Board of Education of the City of New York and Health and Hospitals Corporation, Defendants.

No. 77 Civ. 5786 (HFW).

United States District Court,
S.D. New York.

Dec. 19, 1977.

Associations of construction contractors and subcontractors, and others, brought a civil rights action to prevent the Secretary of Commerce and others from enforcing a section of the Public Works Employment Act of 1977 which required ten percent minority business enterprise participation in any local public works projects funded thereunder. The District Court, Werker, J., held that the MBE requirement was a

constitutional method of remedying prior acts of discrimination in the construction industry and one which was fully consistent with civil rights laws that preceded it.

Complaint dismissed.

1. Constitutional Law ⊙ 215.2, 253(2) United States ⊙ 82(3)

Provision of Public Works Employment Act of 1977 requiring ten percent minority business enterprise participation in any local public works project funded by Act did not violate equal protection or due process clause of Fifth Amendment to United States Constitution, but MBE requirement was entirely constitutional method of remedying prior acts of discrimination in construction industry. Local Public Works Capital Development and Investment Act of 1976, §§106(e)(1), (f)(2), 107, 107 as amended 42 U.S.C.A. §§6705(e)(1), (f)(2), 6706, 6708; U.S.C.A. Const. Amends. 5, 14; Act May 13, 1977, 91 Stat. 122; Civil Rights Act of 1964, §§601, 701 et seq., 42 U.S.C.A. §§2000d, 2000e et seq., Rules and Regulations, §1-30.400 et seq., 41 U.S.C.A. Appendix; Small Business Act, §2[8](a), 15 U.S.C.A. §637(a); 42 U.S.C.A. §§1981, 1983, 1985.

2. United States ⊙ 82(3)

Provision of Public Works Employment Act of 1977 which requires ten percent minority business enterprise participation in any local public works project funded under Act was consistent with provisions of Civil Rights Acts of 1866 and 1964. Local Public Works Capital Development and Investment Act of 1976, §106(f)(2) as amended 42 U.S.C.A. §6705(f)(2); Civil Rights Act of 1964, §§601, 701 et seq., 42 U.S.C.A. §§2000d, 2000e et seq.; 42 U.S.C.A. §§1981, 1983, 1985.

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W. Bernard Richland, Corp. Counsel, City of New York, New York City, for defendants City of N.Y. and Bd. of Ed.; Theodore Gilbert, Nathan Ratner, Ellen Kramer Sawyer, Hadley W. Gold, New York City, of counsel.

Robert B. Fiske, Jr., U.S. Atty. for the Southern District of New York, New York City by Mary C. Daly, Gaines Gwathmey, III, Gerald Hartman, Dept. of Justice, Washington, D.C., for defendant Secretary of Commerce.

MEMORANDUM DECISION

WERKER, District Judge.

The plaintiffs in this civil rights action, several associations of construction contractors and subcontractors and a firm engaged in heating, ventilation and air conditioning work, by order to show cause seek declaratory and injunctive relief to prevent the Secretary of Commerce, as the program administrator, and the remaining defendants, as potential project grantees, from enforcing section 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. §6705(f)(2) (the "Act"), which requires 10 percent minority business enterprise participation in any local public works project funded

thereunder.[1] Plaintiffs allege in their complaint that section 103(f)(2) of the Act (the "MBE requirement") violates the equal protection clause of the fourteenth amendment and hence also the due process clause of the fifth amendment.[2] Plaintiffs further allege that the MBE requirement is violative of the clear Congressional policy underlying the Civil Rights Acts of 1866 and 1964.

Similar allegations have recently been considered in several other districts.[3] It appears, however, that none of those courts have reached a final decision on the merits and, as a consequence, this may well be the first decision squarely holding

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1. Under section 103(f)(2) of the Act a minority business enterprise is defined as "a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members." Minority group members, are defined as "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts."

2. Although the fifth amendment contains no express equal protection clause, it has been held that the due process clause of that amendment incorporates fourteenth amendment equal protection elements. *Washington v. Davis*, 426 U.S. 229, 239, 96 S. Ct. 2040 48 L. Ed.2d 597 (1976); *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S. Ct. 693, 98 L. Ed. 884 (1954).

3. *Wright Farms Construction, Inc. v. Kreps*, 444 F. Supp. 1023 (D. Vt. 1977); *Ohio Contractors Association v. Economic Development Administration*, No. 77-619 (S.D. Ohio Nov. 22, 1977); *Montana Contractors Association v. Higgins*, 439 F. Supp. 1331 (D. Mont. 1977); *Associated General Contractors of Wyoming, Inc. v. Secretary of Commerce*, No. 77-222 (D. Wyo. Nov. 4, 1977); *Florida East Coast Chapter of the Associated General Contractors of America v. Secretary of Commerce*, No. 77-8351 (S.D. Fla. Nov. 3, 1977); *Associated General Contractors of California v. Secretary of Commerce*, 441 F. Supp. 955 (C.D. Calif. 1977); *Constructors Association of Western Pennsylvania v. Kreps*, 441 F. Supp. 936 (W.D. Pa. Oct. 13, 1977).

that the MBE requirement is an entirely constitutional method of remedying prior acts of discrimination in the construction industry and one which is fully consistent with the civil rights laws that preceded it.[4]

BACKGROUND

The complaint in this action was filed on November 30, 1977 and an initial hearing on plaintiffs' order to show cause was held the same day. At the close of that hearing, the Court denied plaintiffs' request for a temporary restraining order and, pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure, set the matter down for a consolidated hearing on the application for a preliminary injunction and trial on the merits the following day. The court further directed that each defendant file a memorandum of law at the time of the preliminary injunction hearing and trial.[5] That proceeding took place on November 31 and December 2, 1977, and further memoranda have since been filed. Although the Secretary has expressed concern about the speed with which this matter proceeded to a trial, that issue, quite obviously, has been mooted by the determination reached herein.

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4. In *Wright Farms, supra*, Judge Coffrin set down a hearing on a preliminary injunction and trial on the merits for December 12, 1977. There is no indication, however, that he has yet issued any opinion following that proceeding.

5. At the time of the initial hearing, plaintiffs had not served the Health and Hospitals Corporation of the City of New York, the New York City Board of Education or the New York City Board of Higher Education, each of which is a separate governmental entity. Accordingly, the Court directed that by 5:00 p.m. the following day each of these defendants be personally served with plaintiffs' complaint and accompanying papers. At the consolidated hearing and trial, Theodore Gilbert, Esq., an Assistant Corporation Counsel for the City of New York, entered an additional appearance on behalf of the Board of Education, but no one has appeared for either the Board of Higher Education or the Health and Hospitals Corporation.

Decision of the United States District Court for the Southern District of New York Dated December 19, 1977 (Werker, J.)

HISTORY OF THE MBE REQUIREMENT

The Act was passed to extend the provisions of Title I of the Local Public Works Capital Development and Investment Act of 1976, Pub. L. No. 94—369, 90 Stat. 999—1012 (1976), under which Congress appropriated $2 billion to stimulate the national economy and the sagging construction industry by providing direct grants to state and local governments for the construction of public facilities which would immediately create a substantial number of jobs.[6] See H.R.Rep.No.1077, 94th Cong., 2d Sess. (1976). To assure that the program would actually be of direct benefit to the construction industry, the Act added a requirement that private firms, and not governmental units, perform any work funded. Act §103(e)(1), 42 U.S.C. §6705(e)(1); H.R.Rep.No.20, 95th Cong., 1st Sess. 4 (1977). An additional expenditure of $4 billion for construction projects was authorized under section 109 of the Act, 42 U.S.C. §6708, and Congress subsequently appropriated $2 billion for that purpose under what is commonly known as "Round Two" of the Local Public Works Program. Economic Stimulus Appropriations Act, Pub.L. No. 95—29, 91 Stat. 122, 124 (1977).

When the Act was being considered on the floor of the

6. In the City of New York alone, $193,838,646 has been awarded for 83 projects to be built under the Act. It has been estimated that the New York City projects will generate "approximately 6,348,842 hours of employment, the equivalent of a full year of employment for 5039 construction workers." It is further anticipated that these projects will generate the equivalent of a full year of employment for 1618 workers in construction-related industries. Spending generated by these individuals and their employers is expected to produce at least an additional 18,644 person years of employment. Affid. of Anthony J. Sulvetta, Chief of the Program Analysis Division of the Economic Development Administration, sworn to Dec. 1, 1977, at 2, 4. The impact of Act-funded projects on the national economy is equally dramatic. *Id.* at 4-5.

Decision of the United States District Court for the Southern District of New York Dated December 19, 1977 (Werker, J.)

House, Representative Parren Mitchell of Maryland introduced an amendment subsequently incorporated into the Act as the MBE requirement. *See* 123 Cong.Rec. H 1437—41 (daily ed. Feb. 24, 1977). That provision, in its present form, reads as follows:

> "Except to the extent that the Secretary determines otherwise, no grant shall be made under this chapter for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises."

The Secretary of Commerce, pursuant to authority granted her under section 107 of the Act, 42 U.S.C. §6706, has also promulgated regulations to carry out the terms of the MBE requirement while still affording an escape mechanism to contractors doing business in areas where compliance with the 10 percent set-aside is impossible.[7] Under the regulations, a project *grantee,* not the contractor, can seek a waiver of the MBE requirement when it first applies for a grant or, if

7. The regulations, which appear at 42 Fed. Reg. 27,434-35 (1977) (to be codified in 13 C.F.R. §317.19), provide in pertinent part as follows:

> (b) Minority business enterprise. (1) No grant shall be made under this part for any project unless at least ten percent of the amount of such grant will be expended for contracts with and/or supplies from minority business enterprises.
>
> (2) The restriction contained in paragraph (1) of this subsection will not apply to any grant for which the Assistant Secretary makes a determination that the ten percent set-aside cannot be filled by minority businesses located within a reasonable trade area determined in relation to the nature of the services or supplies intended to be procured.

necessary, at any later time—provided that sufficient supporting information is furnished to the reviewing officer. *See* Affid. of M.L. Banner, Chief of the Atlantic Regional Office of the Economic Development Administration, sworn to December 5, 1977. Moreover, the Department of Commerce has issued two sets of interpretive guidelines and a technical bulletin to assist project grantees in their efforts to comply with the MBE requirements.[8]

DISCUSSION

A. *Constitutionality of the Act.*

[1] The first issue presented to the Court is whether the MBE requirement incorporates a constitutionally impermissible racial or ethnic quota, as plaintiffs suggest, or merely, as defendants argue, a legislative preference intended to remedy the adverse effects of past or present discrimination. Although the Secretary of Commerce steadfastly maintains that the MBE requirement should be considered as a goal which can be waived "where facts show that enforcement would be impractical,"[9] Secretary's Memorandum in Opposition to Plaintiffs' Motion at 13, and presumably that it should therefore be subject to some lesser standard, the Court need not enmesh itself in the goal

8. Economic Development Admin., U.S. Dep't of Commerce, Guidelines for Round II of the Local Public Works Program (June 1977); Guidelines for 10% Minority Business Participation in LPW Grants (Aug. 1977); Minority Business Enterprise Technical Bulletin (Oct. 1977).

9. The Secretary's argument is, in this regard, overstated, for waivers are only granted "under exceptional circumstances." Guidelines for 10% Minority Business Participation in LPW Grants, *supra*, at 13. One court has accurately described the waiver criterion as one of practical impossibility. *Ohio Contractors Association v. Economic Development Administration*, slip op. at 14.

versus quota controversy, for resolution of the constitutional question presented by the plaintiffs would not be advanced one iota by such an exercise. No matter how the MBE requirement is characterized, it cannot be denied that it distinguishes among various business enterprises, at least in part, based upon the racial background of their principals. Consequently, since its operation involves the use of an inherently "suspect" classification, rigid scrutiny of both Congressional purpose and the means selected to effectuate that purpose is clearly mandated. *See Loving v. Virginia*, 388 U.S. 1, 11, 87 S.Ct. 1817, 18 L.Ed.2d 1010 (1967); *Bolling v. Sharpe*, 347 U.S. 497, 499, 74 S.Ct. 693, 98 L.Ed. 884 (1954); *Korematsu v. United States*, 323 U.S. 214, 216, 65 S.Ct. 193, 89 L.Ed. 194 (1944).

Two standards must therefore be met under the traditional formulation. First, the governmental objective advanced by the Act must be shown to serve a "compelling state interest." *See Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); second, defendants must demonstrate that other available means of accomplishing the objective would not, in practice, prove to be less discriminatory.[10] *Dunn v. Blumstein*,

10. The Secretary contends that the proper standard for evaluation of legislative classifications that are inherently suspect has been recently set forth in *In re Griffiths*, 413 U.S. 717, 721-22, 93 S. Ct. 2851, 2855, 37 L. Ed.2d 910 (1973), under which the United States need only show:

> that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is "necessary to the accomplishment" of its purpose or the safeguarding of its interest. (Footnotes omitted.)

The Supreme Court expressly noted, however, that characterizing the requisite state interest as "overriding" or "compelling" or "substantial" signifies no substantive distinction, *id.* at 722 n. 9, 93 S. Ct. 2851. Furthermore, the Court sees no real difference between the *Griffiths* requirement that the classification be necessary and the concept that the classification must be narrowly drawn. The Court therefore adheres to the more frequently cited rigid scrutiny formula.

405 U.S. 330, 337, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972); *Loving v. Virginia,* 388 U.S. at 11, 87 S.Ct. 1817; *Associated General Contractors of California v. Secretary of Commerce,* 441 F.2d at 964. It is the Court's view that both of these requirements have been met in this action.

1. *Compelling Interest Analysis.* Plaintiffs concede that "a compelling state interest is present if the racial classification is intended to remedy the vestiges of present and/or past discrimination," Plaintiffs' Memorandum in Support of Preliminary Injunction at 10, but argue that the formal legislative history of the Act is devoid of any indication that Congress wished to assist minorities, rather than economically disadvantaged groups in general. *Id.* at 965. The Congressional purpose underlying enactment of the MBE requirement cannot be discerned merely by examining the reports of the Senate and House committees that considered the Act, however, because the minority business set-aside was not proposed until a relatively late date in the draft bill's history and was therefore never considered by any Congressional committee. *See Associated General Contractors of California v. Secretary of Commerce,* 441 F.2d at 969. Thus, even though the House Public Works and Transportation Committee called for federally financed or assisted public works projects as a "dual purpose instrument to help revitalize the Nation's financially-pressed communities and reactivate the distressed construction industry," H.R.Rep.No.20, 95th Cong., 1st Sess. at 1, there may well be other, equally important reasons for passage of the Act by Congress. As Professor Dickerson has aptly noted, there is frequently "a congeries of purposes" behind a bill. R. Dickerson, The Interpretation and Application of Statutes 89 (1975). It is therefore necessary, in the Court's view, to consider both the "debate rhetoric" surrounding introduction of the MBE requirement and the societal and legislative context within which that provision was meant to operate. *See Katzenbach v.*

Morgan, 384 U.S. 641, 86 S.Ct. 1717, 16 L.Ed.2d 828 (1966) in which the Court discussed what Congress *might have found* in enacting challenged legislation.

Turning first to the floor debate, the Court finds that the remarks made in support to remedy prior wrongs to minority groups, not merely, as plaintiffs contend, a general desire to assist economically pressed construction contractors, subcontractors and vendors. For example, Representative Mitchell noted in his remarks that the federal government's program of assistance to minority business permits them to become "viable entities in our system" only to be "cut off" when contracts are awarded, and he added that "the only way that we are going to get the minority enterprises into our system" is by setting aside funds. 123 Cong.Rec. H 1437 (daily ed. Feb. 24, 1977). Representative John Conyers of New York, who also spoke in favor of the Mitchell amendment, observed perhaps a bit more directly that "minority contractors and businessmen who are trying to enter the bidding process . . . *get the 'works' almost every time." Id.* at H 1440 (emphasis added). *See also* remarks of Representative Biaggi at *id.* ("Nation's record with respect to providing opportunities for minority businesses is a sorry one"); and remarks of Senator Brooke, *id.* at S 3910 (daily ed. Mar. 10, 1977) (noninvolvement of minority business exists despite legislation, executive orders and regulations).

It is true that these statements do not expressly attribute the difficulties encountered by minority business enterprises to prior racial discrimination, but whatever ambiguity is present is easily resolved when the available empirical data is examined. Thus, although the United States has a minority population of approximately 17 percent, only about four percent of all businesses are controlled by members of minority groups, and they account for less than one percent of national gross business receipts. Office of Minority Business Enterprise, United States

Dep't of Commerce, Minority Business Opportunity Handbook at I—1 (August 1976) ("Minority Handbook").[11] Minority businesses also receive less than one percent of the $120 billion in government contracts awarded annually. United States Comm'n on Civil Rights, Minorities and Women as Government Contractors 2, 6 n. 10 and 86 (May 1975). Plaintiffs question the soundness of the data contained in the reports relied upon by the Secretary, and point to recent increases in the number of minority businesses and the amount of their dollar receipts,[12] Plaintiffs' Post-Trial Memorandum at 10, but even if the statistics for minority businesses were to be doubled, there would still be an ample basis for Congress to have concluded that "the severe shortage of potential minority entrepeneurs with general business skills is a result of their historic *exclusion* from the mainstream economy." *See* Minority Handbook at I—1—2 (emphasis added).

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11. A House committee recently suggested slightly different statistics:

> While minority persons comprise about 16 percent of the Nation's population, of the 13 million businesses in the United States, only 382,000, or approximately 3.0 percent, are owned by minority individuals. The most recent data from the Department of Commerce also indicates that the gross receipts of all businesses in this country totals about $2,540.8 billion, and of this amount only 16.6 billion or about 0.65 percent was realized by minority business concerns.

Report of the House Committee on Small Business, H. R. Rep. No. 1791, 94th Cong., 2d Sess. 124 (1977).

12. Between 1969 and 1972, the number of minority owned construction firms increased by 34 percent while gross receipts for such firms rose 84 percent. Bureau of the Census, U.S. Dep't of Commerce, 1977 Survey of Minority-Owned Business Enterprises (May 1975).

In fact, it appears that a House subcommittee has made that very finding. In reviewing the record of certain federal programs for minority business enterprises, the House Subcommittee on Small Business Administration Oversight and Minority Enterprise observed that:

> The effects of past inequities stemming from racial prejudice have not remained in the past. The Congress has recognized the reality that past discriminatory practices have, to some degree, adversely affected our present economic system.

Report of the House Committee on Small Business, H.R.Rep.No.1791, 94th Cong., 2d Sess. 124 (1977).

The subcommittee furthermore noted that

> over the years, there has developed a business system which has traditionally excluded measurable minority participation. In the past more than the present, this system of conducting business transactions overtly precluded minority input. Currently, we more often encounter a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities. Minorities, until recently, have not participated to any measurable extent, in our total business system generally, or in the construction industry, in particular.

Id. at 182

Where there is, as here, a statistical disparity between the representation of minority groups in the general population and

the degree of their involvement in economic activity, the Court believes that Congress could reasonably believe that prior racial discrimination was the cause.[13] *See, e.g., Hazelwood School District v. United States,* 433 U.S. 299, 97 S.Ct. 2736, 53 L.Ed.2d 768, 45 U.S.L.W. 4882 (U.S. June 28, 1977); *Constructors Association, of Western Pennsylvania v. Kreps,* 441 F.Supp. 936. However, even if the members of Congress were not aware of the relevant statistical information at the time that they adopted the MBE requirement, certainly they must have acted with knowledge of the many federal antidiscrimination measures implemented over the past several years.[14] When the Mitchell amendment is considered against the background of those programs, it becomes rather obvious that the MBE requirement was incorporated into the Act after only brief debate because of a general awareness of the compelling need for legislative action capable of overcoming the effects of prior discrimination against minority businesses seeking to

13. Plaintiffs contend that under *Equal Employment Opportunity Commission v. Local 14,* 553 F.2d 251, 255 (2d Cir. 1977), the Secretary should only be entitled to marshal post-1965 statistics since Titles VI and VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000d and 2000e *eq seq.,* were not effective prior to then. The question before the Court, however, is what Congress could rightfully infer as to the reason for the poor showing of minority enterprises in our national economy; passage of the Civil Rights Act of 1964 is entirely irrelevant in that regard.

14. Judge Snyder catalogued many of the federal programs in *Constructors Association of Western Pennsylvania v. Kreps,* op. at 951 n. 8, and the reader is referred to that source for a summary description of the federal effort. The Secretary maintains that there are some 35 federal assistance programs designed particularly for minority enterprises. *See* Office of Minority Enterprise, U.S. Dep't of Commerce, Federal Assistance Programs for Minority Business Enterprises (1977).

participate in government contracting.[15]

None of the evidence introduced at the hearing held in this matter even remotely suggests a contrary conclusion. At best, the testimony shows that construction contractors in the New York City area have not engaged in any concerted effort to discriminate against minority subcontractors and venders.[16]

15. Plaintiffs contend that the federal amelioratory scheme consists of remedies, which "cannot be substituted for the necessary clear basis of legislative findings and reliance to validate this act." Plaintiffs' Post-Trial Memorandum at 13-14. However, the critical issue before the Court is not whether Congress, in enacting the MBE requirement into law, actually made an express finding that there was prior racial discrimination in the construction industry; the issue, more properly, is whether such a finding would have been justified. As the Supreme Court noted in *Katzenbach v. Morgan,* 384 U.S. 641, 653, 86 S. Ct. 1717, 1725, 16 L. Ed.2d 828 (1966), "any contrary conclusion would require us to be blind to the realities familiar to the legislators." *Cf. Ohio Contractors Association v. Economic Development Administration,* slip op. at 17 (Court need not explore whether particular legislative act in question actually serves compelling interest so long as it falls within confines of well-established state interest.

16. Plaintiffs proffered the testimony of two construction contractors whose firms had submitted bids for projects funded under the Act. Both witnesses stated that their firms had been the successful bidder on projects requiring minority business enterprise participation and intended to submit further bids for additional Act-funded projects; that the 10 percent MBE requirement made it necessary for them to deal with minority subcontractors and venders whom they would not otherwise employ in connection with specified projects; and that they had each used minority venders or subcontractors on previous projects even though that was not required by the bid specifications for those projects. The sole witness for the Secretary was an Assistant Commissioner of the New York State Commission on Human Rights who, in essence, conceded on cross examination that he knew of no concerted effort by construction contractors to discriminate against minority business enterprises in the City of New York.

(Cont'd)

Although a host of labor union discrimination cases make that proposition rather dubious,[17] even if it were to be accepted, *arguendo,* based upon the disgraceful record of minority enterprise involvement in our national economy, Congress could still find that racial discrimination against minority businesses remained a serious problem in many *other* areas of the country. And as even plaintiffs have admitted, that is a problem the

(Cont'd)

One of the construction contractors testified that he was meeting the MBE requirement for construction of a tide gate regulator by purchasing the mechanical equipment at somewhat increased cost from a minority vender, rather than acquiring it directly from the manufacturer as he normally would. Transcript at 39-40. At the time of the hearing, the Court was rather critical of this practice, which it suggested really amounted to incorporation of a welfare program within a public works project. Transcript at 66. According to the Secretary's published guidelines, however, "only the commission or fee earned by the MBE may be counted toward the 10% requirement" when the MBE "acts merely as an agent or a relatively passive conduit in connection with the provision of services or materials." Indeed, "even this commission or fee will not be counted if the MBE performs no substantive services and is a totally passive conduit." Minority Business Enterprise Technical Bulletin, *supra,* at 3-4. This restriction may make it even more difficult for nonminority contractors to comply with the MBE requirement but it certainly resolves any concern the Court may have had over possible squandering of federal funds. Furthermore, the restriction increases the likelihood that minority firms will be involved in large-scale construction projects in a meaningful way.

17. *E.g., EEOC v. Local 638,* 401 F. Supp. 467 (S.D.N.Y. 1975), *modified,* 532 F.2d 821 (2d Cir. 1976), *aff'd after remand,* 565 F.2d 31 (2d Cir. 1977); *United States v. Local 638, Enterprise Association Steamfitters,* 360 F. Supp. 979 (S.D.N.Y. 1973), *modified sub nom. Rios v. Enterprise Association Steamfitters, Local 638,* 501 F.2d 622 (2d Cir. 1974); *United States v. Local 638, Enterprise Association Steamfitters,* 347 F. Supp. 169 (S.D.N.Y. 1976); *United States v. Wood Wire & Metal Lathers, Local 46,* 341 F. Supp. 694 (S.D.N.Y. 1972), *aff'd,* 471 F.2d 408 (2d Cir.), *cert. denied,* 412 U.S. 939, 93 S. Ct. 2773, 37 L. Ed.2d 398 (1973).

federal government certainly has a compelling interest in resolving.

2. *Effective yet narrowly drawn means.* The critical question therefore becomes whether Congress adopted the least discriminatory method of accomplishing its concededly legitimate objective. In this regard, plaintiffs urge that the defendants could achieve the apparent purpose of Congress, with less imposition on nonminority persons, through greater use of (1) cash advances to minority contractors pursuant to 41 C.F.R. §1—30.400 *et seq.* (1977), and (2) section 8(a) of the Small Business Act, 15 U.S.C. §637(a), under which government procurement contracts are let to the Small Business Administration and are then fulfilled through noncompetitive subcontracts to "small business concerns owned and controlled by socially or economically disadvantaged persons." *See* 13 C.F.R. §124.8—1(b) (1977). Plaintiffs further contend that a set-aside for all disadvantaged enterprises would be a less onerous method of remedying the problem of prior racial discrimination. The record presently before this Court establishes, however, that the section 8(a) program has not been an effective remedy. *See* Minorities and Women as Government Contractors, *supra,* at 35—62. And the record further demonstrates that programs designed to provide minority businesses with additional capital through loans or advances are incapable of making them full participants in our economy since construction contractors clearly perfer to deal with firms that have an established track record. *See* Transcript at 18, 51. Yet without mandated opportunities to participate in large scale construction contracts, minority businesses are not in a position to develop such credentials and, therefore, are not likely to garner a greater share of government contracts. As one of the witnesses at trial put it:

> "It gets to be a vicious cycle because the insurance companies and the banks will not cooperate with them if

> they don't have an established track record. They can not [*sic*] establish a track record if they don't get a chance to perform.

Transcript at 82. Expanding the set-aside to include all economically disadvantaged groups is also no answer to the problem, for in our present economy all construction firms are economically disadvantaged and redefining the set-aside to include them all would consequently be tantamount to striking it from the legislation entirely.

Plaintiffs make the further argument that any MBE requirement should be limited to a percentage "commensurate with the present minority participation in the economy." Plaintiffs' Post-Trial Memorandum at 15. The basis for this contention is apparently that the United States Commission of Civil Rights has only set the following goal for the federal government:

> Within the next 5 years, the Federal Government should increase the annual dollar volume of its contracts and subcontracts with minority males, minority females and nonminority, female-owned firms to an amount at least equal to their representation in all American businesses. Minorities and Women as Government Contractors, *supra,* at 129.

It is not clear whether plaintiffs would want the MBE requirement reduced to a tenth of its present scope to reflect more accurately the degree to which minority businesses actually participate in the United States economy or would be content merely to have it halved to approximate the percentage of minority enterprises that presently exist; nevertheless, the suggestion is absurd in either case.

In the first place, since the Act accounts for less than four percent of annual government contracting, the Commission's goal would not be met even if the MBE requirement were readjusted to require that 90 percent of all Act funds be spent through subcontracts with minority enterprises. Secondly, as Judge Snyder noted in *Constructors Association of Western Pennsylvania v. Kreps:*

> [T]he 10% figure is a reasonable one. Although the minority population is about 17%, the 10% figure is justifiably below that percentage, given their 1% past participation in the construction industry, and is not a concealed limitation on them. Since the program is short-term, there is no danger that the 10% requirement would become in practice a limitation of 10% once minority businesses have become established and competitive. On the other hand, the 10% requirement applies only to the extent local projects are funded by grants under [the Act] and is not overly intrusive on non-minorities. It is not a requirement that projects receiving federal funds assure that 10% of the *project* funds be given to minority businesses. Nor does it attempt to create an overall 10% requirement for the construction industry as a whole. These public works funds are intended to boost the construction industry by channeling extra funds into one aspect of the industry. A set-aside of 10% of these remedial funds for an additional remedial purpose is not unreasonable, especially given the availability of a waiver to the extent the 10% objective is unobtainable.

441 F.Supp. at 953.

Moreover, since the MBE requirement is subject to a December 31, 1978 cut-off date, Congress will have to

demonstrate continued compelling need in order for it to be extended beyond that time. Whether such need exists can then be determined through examination of readily available statistics, *id.*, at 953, including presumably updated Census Bureau data. *See* Survey of Minority-Owned Business Enterprises, *supra*, at 1.

Any reduction in the percentage of minority business participation required under the Act would, of course, result in reduced channeling of funds to the detriment of nonminority businesses and therefore less discriminatory impact. *See Ohio Contractors Association v. Economic Development Administration*, slip op. at 20. Nevertheless, the Court believes that requiring that 10 percent of all grant funds awarded under the Act be set aside for minority contractors or venders cannot be considered unreasonable in veiw of the consistent failure of less intrusive attempts to nurture the growth of minority enterprises. The Court accordingly finds that the MBE requirement in its present form is necessary for the accomplishment of Congress' goal of promptly alleviating the handicap imposed upon minority businesses due to the lingering effects of discriminatory conduct in the construction industry, and plaintiffs' first two causes of action are dismissed.

B. *The Statutory Question.*

[2] Plaintiffs raise a further claim that the MBE requirement violates various provisions of the Civil Rights Act of 1866 and 1964.[18] The Court does not believe, however, that there is any inconsistency between the requirements imposed by virtue of the Civil Rights Acts and the course of conduct mandated by the MBE requirement. *See Constructors Association of Western Pennsylvania v. Kreps*, at 954. Indeed, it

18. 42 U.S.C. §§1981, 1983 and 1985 (1970); 42 U.S.C. §§2000d and 2000e *et seq.* (1970).

defies credulity to argue that measures intended to correct the invidious effects of racial discrimination must be limited to remedies which are not race sensitive, for minority groups would forever be frozen into the status quo if that were the intent of the Civil Rights Acts. *Contractors Association of Eastern Pennsylvania v. Secretary of Labor*, 442 F.2d 159, 173—74 (3d Cir.), *cert. denied*, 404 U.S. 854, 92 S. Ct. 98, 30 L.Ed.2d 95 (1971). Even more importantly, the host of cases permitting racially sensitive remedies for prior discriminatory acts totally belies plaintiffs' argument. *See, e. g., United Jewish Organizations v. Carey*, 430 U.S. 144, 161, 97 S.Ct. 996, 51 L.Ed.2d 229 (1977); *Associated General Contractors of Massachusetts v. Altshuler*, 490 F.2d 9, 16—17 (1st Cir. 1973), *cert. denied*, 416 U.S. 957, 94 S.Ct. 1971, 40 L.Ed.2d 307 (1974) (and cases cited therein). As the Court of Appeals for the Second Circuit has observed, racial classification is frequently impermissible not because it is a per se violation of the Constitution, but because it has been drawn for the purpose of maintaining racial inequality. Where, on the other hand, it is employed to effect equality, it is clearly proper. *Norwalk CORE v. Norwalk Redevelopment Agency*, 395 F.2d 920, 931—32 (1968). It may well be that the Supreme Court's impending decision in the *Bakke* case[19] will necessitate some reevaluation of "reverse discrimination" actions such as this one, but it is not the role of this Court to follow the law as superior tribunals might delineate it at some time in the future. The Court therefore holds that the MBE requirement accords with the intent of the Civil Rights Acts and rejects plaintiffs' statutorily-based contentions.

19. *Bakke v. Regents of the University of California*, 18 Cal.3d 34, 132 Cal. Rptr. 680, 553 P.2d 1152 (1976), *cert. granted*, 429 U.S. 1090, 97 S. Ct. 1098, 51 L. Ed.2d 535 (1977).

Decision of the United States District Court for the Southern District of New York Dated December 19, 1977 (Werker, J.)

SUMMARY

In conclusion, the court holds that defendants have sustained their burden of establishing the constitutionality of the MBE requirement. Plaintiffs' request for a preliminary injunction and declaratory relief is denied, the Secretary of Commerce's motion for a directed verdict is granted and the complaint is dismissed in its entirety.

SO ORDERED.

OPINION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT DATED SEPTEMBER 22, 1978

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 894—September Term, 1977.

(Argued May 24, 1978 Decided September 22, 1978.)

Docket No. 78-6011

H. EARL FULLILOVE, FRED MUNDER, JEREMIAH BURNS, JOSEPH CLARKE, GERARD A. NEUMAN, WILLIAM C. FINNERAN, JR., PETER J. BRENNAN, THOMAS CLARKSON, CONRAD OLSEN, JOSEPH DEVITTA, as Trustees of THE NEW YORK BUILDING AND CONSTRUCTION INDUSTRY BOARD OF URBAN AFFAIRS FUND; ARTHUR GAFFNEY as President of the BUILDING TRADES EMPLOYERS ASSOCIATION, GENERAL CONTRACTORS ASSOCIATION OF NEW YORK, INC., GENERAL BUILDING CONTRACTORS OF NEW YORK STATE, INC., and SHORE AIR-CONDITIONING CO., INC.,

Plaintiffs-Appellants,

—v.—

JUANITA KREPS, SECRETARY OF COMMERCE OF THE UNITED STATES OF AMERICA, THE STATE OF NEW YORK and THE CITY OF NEW YORK, THE BOARD OF HIGHER EDUCATION and THE HEALTH & HOSPITALS CORPORATION,

Defendants-Appellees.

Before:

OAKES, *Circuit Judge,* and
BLUMENFELD* and MEHRTENS,** *District Judges.*

* Senior United States District Judge for the District of Connecticut, sitting by designation.

** Senior United States District Judge for the Southern District of Florida, sitting by designation.

This is an appeal from an order of the United States District Court for the Southern District of New York, Werker, *J.*, denying plaintiffs' application for a preliminary injunction restraining the defendants from implementing a federal statute requiring that 10 percent of all federal funds appropriated for specified public works projects be expended on bids tendered by minority business enterprises, and dismissing the action.

Affirmed.

ROBERT G. BENISCH (Berman, Paley, Goldstein & Berman, New York, N.Y.); Robert J. Fink, of counsel (French, Fink, Markle & McCallion, New York, N.Y.); Richard L. O'Hara, Robert A. Kennedy, Robert J. Aurigema, William M. Savino, Stephen J. Smirti, Jr., of counsel (Doran, Colleran, O'Hara & Dunne, Garden City, N.Y.), on the brief, *for Plaintiffs-Appellants.*

ROBERT B. FISKE, JR., United States Attorney, New York, N.Y. (Gaines Gwathmey, III, Dennison Young, Jr., Mary C. Daly, Patrick H. Barth, Assistant United States Attorneys, of counsel); Drew S. Days, III, Assistant Attorney General, Civil Rights Div., U.S. Dept. of Justice (Vincent F. O'Rourke, Jr., Jessica Dunsay Silver, of counsel), *for Defendant-Appellee Kreps.*

DOMINICK J. TUMINARO, Assistant Attorney General of the State of New York, New York, N.Y. (Louis J. Lefkowitz, Attorney General, George D. Zuckerman, Assistant Attorney General in charge of Civil Rights Bureau; Arnold D. Fleischer, Assistant Attorney General, of counsel), *for Defendant-Appellee State of New York.*

BLUMENFELD, *District Judge:*

This is an appeal from the decision of the District Court, Werker, *J.*, that upheld the constitutionality of section 103(f)(2) of the Public Works Employment Act of 1977 (PWEA), 42 U.S.C. § 6705(f)(2). The statute mandates that "no grant shall be made under this chapter for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises." "Minority business enterprise" (MBE) is defined as "a business at least 50 per centum of which is owned by minority group members . . . ." The statute defines minority group members in racial terms: "citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts."

Appellants are several associations of contractors and subcontractors and a firm engaged in heating, ventilation and air conditioning work. Their application for a preliminary injunction on their petition for declaratory and injunctive relief to prevent the Secretary of Commerce as program administrator from enforcing the MBE provision was consolidated with a hearing on the merits. The District Court found that the provision was a constitutionally valid exercise of congressional power to remedy the effects of past discrimination in the construction industry. The District Court denied their petition and dismissed the complaint. We affirm.

I.

In 1976 Congress enacted the Local Public Works Capital Development and Investment Act of 1976, Pub. L. No. 94-369 (July 22, 1976), 90 Stat. 999-1012, 42 U.S.C. §§ 6701-6735, designed to help alleviate nationwide unemployment in the economically depressed construction industry by appropriating $2 billion for public works projects. The Secretary of Commerce was to administer the program through the Economic Development Administration (EDA), charged with distributing funds under the Act to state and local governments. Congress mandated that the program be administered expeditiously[1] and the Secretary approved grants for the entire appropriation by February 1977. In May 1977, Congress supplemented the initial appropriation through the Public Works Employment Act of 1977, Pub. L. No. 95-28 (May 13, 1977), 91 Stat. 116-121, 42 U.S.C. §§ 6701-6736, to the extent of an additional $4 billion.

During the consideration of the PWEA on the floor of the House, the MBE requirement was introduced as an amendment to the Act. As contained in the final enactment, the provision reads:

> "Except to the extent that the Secretary determines otherwise, no grant shall be made under this chapter for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term 'minority business enterprise' means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos and Aleuts."

1 The Act required that each eligible project be started within 90 days of EDA approval (42 U.S.C. § 6705(d)), any application that was not rejected within 60 days of its submission to EDA would be deemed approved (42 U.S.C. § 6706), and the EDA was ordered to promulgate regulations governing grant applications within 30 days of the Act's passage (42 U.S.C. § 6706). The Act became law on May 24, 1977 and funds allocated under the PWEA had to be committed to an approved state or local project by September 30, 1977.

The appellants' attack is aimed only at the amendment; they do not contend that the inclusion of the amendment rendered the entire statute unconstitutional.

The question presented in this appeal is a narrow one. We are called upon to decide whether Congress acted in a constitutionally permissible manner in conditioning the receipt of federal grants for local public works projects under the PWEA upon the requirement that 10 percent of the grants be allocated to minority business enterprises.

II.

At the outset we note that when Congress seeks to exercise its spending powers, it is required to distribute federal funds in a manner that neither violates the equal protection rights of any group nor continues the effects of violations that have occurred in the past, for

> "[s]imple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes, or results in racial discrimination."

Lau v. *Nichols*, 414 U.S. 563, 569 (1974), *quoting* 110 Cong. Rec. 6543 (1964) (remarks of Sen. Humphrey, quoting from President Kennedy's message to Congress, June 19, 1963).

The Secretary acknowledges that in enacting the MBE provision Congress created an explicitly race-based condition on the receipt of PWEA funds. Under modern equal protection standards,[2] racial classifications are "suspect." This denomination often triggers the highest level of scrutiny imposed by the courts. *Loving* v. *Virginia*, 388 U.S. 1, 11 (1967). Usually when a classification turns upon an individual's racial or ethnic background, "he is entitled to a judicial determination that the burden he is asked to bear on that basis is precisely tailored to serve a compelling governmental interest." *Regents of the University of California* v. *Bakke*, 46 U.S.L.W. 4896, 4904 (U.S. June 28, 1978) (opinion of Powell, J.); *In re Griffiths*, 413 U.S. 717 (1973). Whether rigid scrutiny is mandated whenever an act of Congress conditions the allocation of federal funds in a manner which differentiates among persons according to their race is a question we need not reach, for we are of the opinion that even under the most exacting standard of review the MBE provision passes constitutional muster.[3]

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2 Although the Equal Protection Clause appears only in the fourteenth amendment, which applies only to the states, the Supreme Court has held that the equal protection principles of the fourteenth amendment are embodied in the Due Process Clause of the fifth amendment. *See* Hampton v. Mow Sun Wong, 426 U.S. 88, 99-100 (1976); Washington v. Davis, 426 U.S. 229, 239 (1976); Buckley v. Valeo, 424 U.S. 1, 93 (1976); Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

3 Four Justices of the Supreme Court have indicated that an intermediate standard of scrutiny is sufficient when Government "acts not to demean or to insult any racial group, but to remedy disadvantages cast on minorities by past racial prejudice, at least when appropriate findings have been made by judicial, legislative or administrative bodies with competence to act in this area." *Bakke*, *supra*, 46 U.S.L.W. at 4911 (opinion of Brennan, White, Marshall and Blackmun, JJ.) and *see id.* at 4920-21. Mr. Justice Powell, however, rejected that view and the other four Justices did not reach the question.

III.

The principles which the court below applied in rejecting the appellants' contentions that the amendment was either unconstitutional or in violation of the Civil Rights Act of 1964 are not in dispute on this appeal. However, we restate them briefly in order to put the appellants' argument that they were misapplied by the trial judge into sharper focus.

The appellants agree that the district judge correctly decided that "strict scrutiny" was required, but they contend that the standard of review which such scrutiny requires was not correctly applied. Having conceded below and properly so, that "a compelling state interest is present if the racial classification is intended to remedy the vestiges of present and/or past discrimination," they advance two separate arguments that a compelling interest was not shown.

Their argument is that there was not an adequate basis for the court below to conclude that Congress' purpose was to remedy prior wrongs to minority groups who had been denied opportunities in the construction industry as a result of race discrimination. This proposition has two elements that are analytically distinct. That they are treated in combination is understandable for they are bound together and rest to some extent on the same history and policy considerations. The amendment is permissible only if it is a remedy for past discrimination. *See Regents of the University of California* v. *Bakke*, *supra*, 46 U.S.L.W. at 4905 (opinion of Powell, J.). Whether it was Congress' *purpose* to enact a remedy for past discrimination is one question. Whether such discrimination occurred in the past is another question. The second question depends upon an assessment of historical facts, the first upon what was in the mind of Congress.

A. *Congress' Purpose*

Congressional purpose is relevant to consideration of whether the classification is permissible. Under any equal protection test "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation . . . ." *F.S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412, 415 (1920).[4] More recently in *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 17 (1973), the Court said that even if strict judicial scrutiny was not required, the statute "must still be examined to determine whether it rationally furthers some legitimate, articulated[5] state purpose and . . . does not constitute an invidious discrimination in violation of the Equal Protection Clause of the Fourteenth Amendment." *See also* L. Tribe, *American Constitutional Law* § 16-30 at 1083-85 (1978); Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 20-22 (1972). Since strict scrutiny should require no less, we turn our attention to whether Congress articulated its purpose in enacting the amendment.

The rule for ascertaining what the purpose of Congress was in enacting a statute that is subject to scrutiny under

4 The notion that any conceivable purpose which would uphold a classification should be attributed to it, *e.g.*, McGowan v. Maryland, 366 U.S. 420, 425-26 (1961), allows for more judicial restraint than strict scrutiny permits. In *McGowan* the Court stated that the Equal Protection Clause is violated only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective—a statutory discrimination will not be set aside if any state of facts may reasonably be conceived to justify it.

5 Since no content was given to the word "articulated," we view it as a prophylactic against resort to the "any conceivable reason" justification of *McGowan*. See note 4 *supra*.

the Equal Protection Clause is more deferential than the rule which would be applied to test a state statute. In differentiating a law passed by Congress from a mandate by a state legislature, or an administrative agency, the Court has said, "Alternatively if the rule were expressly mandated by the Congress or the President, we might presume that any interest which might rationally be served by the rule did in fact give rise to its adoption." *Hampton* v. *Mow Sun Wong*, 426 U.S. 88, 103 (1976). That a large measure of judicial restraint must be accorded to Congress in its enactment of legislation to remedy past discrimination was affirmed recently in *Regents of the University of California* v *Bakke, supra*, 46 U.S.L.W. at 4905 n.41 (opinion of Powell, J.):

> "[W]e are not here presented with an occasion to review legislation by Congress pursuant to its powers under § 2 of the Thirteenth Amendment and § 5 of the Fourteenth Amendment to remedy the effects of prior discrimination. *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966); *Jones* v. *Alfred H. Mayer*, 392 U.S. 409 (1968). We have previously recognized the special competence of Congress to make findings with respect to the effects of identified past discrimination and its discretionary authority to take appropriate remedial measures."

Judge Werker did not base his decision that it was the purpose of Congress to remedy past discrimination solely on a presumption. There is no need to rely solely on a bare presumption to determine the purpose of Congress. The classification established by the amendment is self-evident. The amendment makes no sense unless it is construed as a set-aside to benefit minority subcontractors.[6] It has been

6 The appellants argue that the legislative history is silent with respect to any purpose to remedy the effect of past discrimination, and

suggested that "[i]f an objective can confidently be inferred from the provisions of the statute itself, recourse to internal legislative history and other ancillary materials is unnecessary." Note, *Developments in the Law—Equal Protection*, 82 Harv. L. Rev. 1065, 1077 (1969). It is also beyond dispute that the set-aside was intended to remedy past discrimination. To support that conclusion, it is "enough that [the court] perceive a basis upon which Congress might predicate a judgment that" the MBE amendment would remedy past discrimination against minority construction businesses. *See Katzenbach* v. *Morgan, supra,* 384 U.S. at 656. In view of the comprehensive legislation which Congress has enacted during the past decade and a half for the benefit of those minorities who have been victims of past discrimination,[7] any purpose Congress might have had

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shows only that $4 billion which Congress allocated under the PWEA was expected to generate 300,000 jobs in other industries. But, by that particular amendment (§ 103(f)(2)), injected in the Act from the floor during the course of the debate, Congress did not create more jobs. It is clear from the amendment that Congress intended to guarantee that part of the jobs already contemplated by the PWEA would go to minority businesses, and not, as the plaintiffs contend, to "disadvantaged as opposed to minority small businesses."

7 For example, Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 28 U.S.C. § 1447; 42 U.S.C. §§ 1971, 1975a-1975d, 2000a to 2000h-6); Pub. L. No. 92-261, §§ 2-8, 10, 11, 13, 86 Stat. 103-113 (codified at 42 U.S.C. §§ 2000e, 2000e-1 to 2000e-6, 2000e-8, 2000e-9, 2000e-13 to 2000e-17); Pub. L. No. 92-318, title IX, § 906(a), 86 Stat. 375 (codified at 42 U.S.C. §§ 2000c, 2000c-6, 2000c-9); Pub. L. No. 93-608, § 3(1), 88 Stat. 1972 (codified at 42 U.S.C. § 2000e-4); Pub. L. No. 94-273, § 3(24), 90 Stat. 377 (codified at 42 U.S.C. § 2000e-14); Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437; Pub. L. No. 90-284, title I, § 103(c), 82 Stat. 75; Pub. L. No. 91-285, §§ 3-6, 84 Stat. 315; Pub. L. No. 91-405, title II, § 204(e), 84 Stat. 853; Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314, 315; Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, title II, §§ 204, 206, title IX, § 405, 89 Stat. 402, 404 (codified at 42 U.S.C. § 1971 *et seq.*); Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73-92 (codified at 18 U.S.C. §§ 231-233, 241, 242, 245, 1153, 2101, 2102; 25 U.S.C. §§ 1301-1303, 1311, 1312, 1321-

other than to remedy the effects of past discrimination is difficult to imagine.

B. *Past Discrimination*

Although Congress' purpose and the factual background from which it sprang are not so disjoined that they could not be considered together, Judge Werker considered the question of past discrimination separately. The comprehensive opinion of the District Judge to which we make reference considered remarks made on the floor of the House when the MBE provision was introduced during the debate on the PWEA. He noted that Representative Mitchell, the amendment's sponsor, criticized the federal program of assistance to minority businesses that permits them to become "viable entities in our system" only to be "cut off" when government contracts are awarded. See Joint App. 160a; 123 Cong. Rec. H. 1437 (daily ed. Feb. 24, 1977), *reprinted in Associated General Contractors* v. *Secretary of Commerce,* 441 F. Supp. 955, 997-1006 (C.D. Cal. 1977) (Appendix C). In concluding that Congress found past discrimination, he also properly relied upon remarks made by Representative John Conyers of New York. Speaking in favor of the amendment, the Representative observed that "minority contractors and businessmen who are trying to enter the bidding process . . . *get the 'works' almost every time.*" *Id.* (emphasis added). Those remarks clearly disclosed the connection between the past discrimination and the "set-aside" amendment, and powerfully reinforced the conclusion reached by the judge.[8]

1326, 1331, 1341; 28 U.S.C. § 1360 nts.; 42 U.S.C. §§ 1973j; 3533, 3535, 3601-3619, 3631); Pub. L. No. 93-265, 88 Stat. 84 (codified at 25 U.S.C. § 1341).

8 Statements made in debates may be regarded as authoritative indicia of congressional intent. Pan American World Airways, Inc. v. CAB,

That an explicit finding of past discrimination was not included in the committee reports may sometimes be "troublesome." *Constructors Association* v. *Kreps*, 441 F. Supp. 936, 952 (W.D. Pa. 1977), *aff'd*, 573 F.2d 811 (3d Cir. 1978).[9] In this case it is not surprising in view of the manner in which the amendment was introduced.[10] But the absence of such a finding in the reports is not determinative. The record that was considered provided sufficient justification for a finding of past discrimination. *Cf. Arizona* v. *Washington*, 46 U.S.L.W. 4127, 4132 (U.S. Feb. 26, 1978) (when record provides sufficient justification for trial judge's mistrial ruling, ruling not subject to collateral attack simply because judge failed to make explicit finding of "manifest necessity" for mistrial). The record may be sparse, but it is not entirely silent.

The judge quite properly took account of the data and observations contained in a report prepared by the Department of Commerce to evaluate existing opportunities for minority business. See U.S. Dept. of Commerce, Office of

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380 F.2d 770, 782 (2d Cir. 1967). The situation here was similar to that in United States v. Oates, 560 F.2d 45, 72 (2d Cir. 1977), where the court said: "It is, of course of critical importance that it was with the explanations of [the Representative who sponsored the amendment] freshly in mind that the full House of Representatives on the very day these remarks were uttered finally approved" the bill. The MBE amendment was considered and passed by the House on February 24, 1977, the date these statements were made on the floor. H.R. Rep. No. 95-20, 95th Cong., 1st Sess., *reprinted in* [1977] U.S. Code Cong. & Ad. News 150. The remarks were much more extensive but were all to the same effect.

9 Judge Snyder in Constructors Ass'n v. Kreps, *supra*, found the same passage sufficient evidence that Congress enacted the MBE provision to remedy past discrimination in the construction industry.

10 This explains the absence of any mention of the amendment in the Committee reports. Furthermore, the lack of extended discussion clearly indicates the knowledge of the congressmen concerning the well-established history of past discrimination in the construction industry.

Minority Business Enterprise, *Minority Business Opportunity Handbook* (August 1976). Noting plaintiffs' objection to the soundness of the data contained in the report, the Judge found "even if the statistics for minority businesses were to be doubled, there would still be an ample basis for Congress to conclude that 'the severe shortage of potential minority entrepreneurs with general business skills is a result of their historical *exclusion* from the mainstream economy.'" Joint App. 161a quoting from the *Minority Handbook* at 1-1-2 (court's emphasis included).

Moreover the judge undertook consideration of evidence that Congress had recorded elsewhere to support its finding that the history of discrimination was specific to the construction industry. A report prepared by the House Subcommittee on Small Business Administration Oversight and Minority Business Enterprise contains the following statement:

> "The very basic problem . . . is that, over the years, there has developed a business system which has traditionally excluded measurable minority participation. In the past more than the present, this system of conducting business transactions overtly precluded minority input. Currently, we more often encounter a business system which is racially neutral on its face, but because of past overt social and economic discrimination is presently operating, in effect, to perpetuate these past inequities. Minorities, until recently have not participated to any measurable extent, in our total business system generally, *or in the construction industry, in particular*. However, inroads are now being made and minority contractors are attempting to 'break-into' a mode of doing things, a system, with which they are empirically unfamiliar and which is historically unfamiliar with them."

Summary of Activities of the Committee on Small Business, House of Representatives, 94th Congress, at 182-83 (November 1976) (emphasis added). The judge's finding that Congress acted upon sufficient evidence of past discrimination is more than amply supported by the record and establishes a "perceived" basis for congressional action.

IV.

In employment discrimination cases it is well established that the government's interest in overcoming the disadvantages resulting from past discrimination in employment on account of race is sufficiently compelling to justify a remedy which requires the use of racial preferences.[11] The vitality of the rationale in those cases has not disturbed by the recent decision of the Court in *Regents of the University of California* v. *Bakke, supra.* The Justices did not disagree with the principle that race-conscious remedies can be imposed when there have been judicial, legislative or administrative findings of past discrimination and the remedies fashioned are appropriately drawn to rectify that

11 Many of those cases are cited by Chief Judge Coffin in support of a decision upholding that principle in Associated Gen. Contractors v. Altshuler, 490 F.2d 9, 16-17 (1st Cir. 1973), *cert. denied*, 416 U.S. 957 (1974), along with Contractors Ass'n v. Secretary of Labor, 442 F.2d 159 (3d Cir.), *cert. denied*, 404 U.S. 954 (1971), which is cited with approval in *Bakke*, 46 U.S.L.W. at 4905.

Section 6705(f)(2) merely broadens the economic area in which that principle applies to include independent contractors in the construction industry. We do not attempt to draw any distinction between services and materials which might be furnished by independent subcontractors on construction jobs. We note, however, that a person conducting a minority business who is denied an opportunity to compete for a certain amount of business on account of his race would have a cause of action under 42 U.S.C. § 1981. Runyon v. McCrary, 427 U.S. 160 (1976); Hollander v. Sears, Roebuck & Co., 450 F. Supp. 496, 499-500 (D. Conn. 1978).

discrimination. *Id.*, 46 U.S.L.W. at 4905 & n.41 (opinion of Powell, J.).[12]

In affirmative action programs to remedy the effects of past discrimination the effect of preferring members of the injured groups at the expense of others must be considered. In *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747 (1976), Mr. Justice Powell, at 784-86 (concurring & dissenting), warned that affirmative action ordered as equitable relief must not exceed the bounds of fundamental fairness. *See Acha* v. *Beame*, 531 F.2d 648 (2d Cir. 1976). It is established that in fashioning remedies for past discrimination courts must be sensitive to interests which may be adversely affected by the remedy. The courts, here, as in a number of other areas where legislation for which there is a compelling interest collides with constitutional principles, have adopted an ad hoc balancing test which examines each particular case, *e.g.*, *Branzburg* v. *Hayes*,

12 As Mr. Justice Powell noted:

"We have never approved a classification that aids persons perceived as members of relatively victimized groups at the expense of other innocent individuals in the absence of judicial, legislative or administrative findings of constitutional or statutory violations. See, *e.g.*, *Teamsters* v. *United States*, 431 U.S. 324, 367-376 (1977); *United Jewish Organizations* [v. *Carey*, 430 U.S. 144, 155-156 (1977)]; *South Carolina* v. *Katzenbach*, 383 U.S. 308 (1960). After such findings have been made, the governmental interest in preferring members of the injured groups at the expense of others is substantial, since the legal rights of the victims must be vindicated. In such a case, the extent of the injury and the consequent remedy will have been judicially, legislatively, or administratively defined. Also, the remedial action usually remains subject to continuing oversight to assure that it will work the least harm possible to other innocent persons competing for the benefit. Without such findings of constitutional or statutory violations, it cannot be said that the government has any greater interest in helping one individual than in refraining from harming another. Thus, the government has no compelling justification for inflicting such harm."

Regents of the Univ. of Cal. v. Bakke, *supra*, 46 U.S.L.W. at 4906-07 (footnote omitted).

408 U.S. 665 (1972) (public interest in law enforcement outweighs reporters' first and fourteenth amendment interest in keeping news sources confidential). One of the significant limitations on a remedy of "reverse discrimination" for past discrimination is that its effects shall "not be 'identifiable,' that is to say, concentrated upon a small ascertainable group of non-minority persons." *EEOC* v. *Local 638 . . . Local 28, Sheet Metal Workers,* 532 F.2d 821, 828 (2d Cir. 1976). *See also Kirkland* v. *New York State Department of Correctional Services,* 520 F.2d 420, 427 (2d Cir. 1975), *cert. denied,* 429 U.S. 823 (1976). The amendment at issue falls well within such a boundary against inequitable results. The PWEA which added $4 billion to the $200 million not yet expended portion of the amount authorized by Round I (Local Public Works Act) amounted to about 2,5 percent of the total of nearly $170 billion spent on construction in the United States for 1977, according to Department of Commerce statistics.[13] The set-aside for minority contractors under the PWEA was for 10 percent of the total grant and thus extends to only .25 percent of funds expended yearly on construction work in the United States. The extent to which the reasonable expectations of these appellants, who are part of that industry, may have been frustrated is minimal. Furthermore, since according to 1972 census figures minority-owned businesses amount to only 4.3 percent of the total number of firms in the construction industry, the burden of being dispreferred in .25 percent of the opportunities in the construction industry was thinly spread among nonminority businesses comprising 96 percent of the industry.[14]

13 U.S. Dept. of Commerce, Industry and Trade Administration, *Construction Review,* May-June 1978, at 11.

14 U.S. Bureau of the Census, *1972 Census of Construction Industries: Industries Series, United States Summary—Statistics for Construction*

Considering that nonminority businesses have benefited in the past by not having to compete against minority businesses, it is not inequitable to exclude them from competing for this relatively small amount of business for the short time that the program has to run.

Ours is not the only circuit in which the MBE amendment's constitutionality has been challenged by associations of general contractors. Other cases that have denied preliminary injunctions against enforcement of the "set-aside" provision are *Rhode Island Chapter, Associated General Contractors* v. *Kreps,* No. 77-0676 (D.R.I. Feb. 6, 1978); *Associated General Contractors* v. *Secretary of Commerce,* No. 77-4218 (D. Kan. Dec. 19, 1977); *Carolinas Branch, Associated General Contractors* v. *Kreps,* 442 F. Supp. 392 (D.S.C. 1977); *Ohio Contractors Association* v. *Economic Development Administration,* No. C-1-77-619 (S.D. Ohio Nov. 22, 1977); *Montana Contractors Association* v. *Kreps,* 439 F. Supp. 1331 (D. Mont. 1977); *Florida East Coast Chapter* v. *Secretary of Commerce,* No. 77-8351 (S.D. Fla. Nov. 3, 1977). *But see Associated General Contractors* v. *Secretary of Commerce,* 441 F. Supp. 955 (C.D. Cal. 1977), *vacated and remanded,* 46 U.S.L.W. 3802 (U.S. July 3, 1978), which held the provision invalid.[15] That case reached

Establishments With and Without Payrolls, Table A 1 (Aug. 1975); U.S. Bureau of the Census, *1972 Survey of Minority-Owned Business Enterprises: Minority-Owned Businesses,* Table 1 (May 1975).

15 In Associated Gen. Contractors v. Secretary of Commerce, *supra,* the court held that § 103(*f*)(2) of the PWEA is inconsistent with Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d, 2000d-1. The trouble with that conclusion is that it is based on the overbroad premise that *any* reverse discrimination in a remedy for past discrimination is prohibited *per se* by Title VI. A majority of the Supreme Court has held that "Title VI goes no further in prohibiting the use of race than the Equal Protection Clause of the Fourteenth Amendment itself." Regents of the Univ. of Cal. v. Bakke, *supra,* 46 U.S.L.W. at 4911 (opinion of Brennan, White, Marshall and Black-

the Supreme Court where it was remanded to the District Court for consideration of mootness. *See also Wright Farms Construction, Inc.* v. *Kreps*, No. 77-260 (D. Vt. Dec. 23, 1977).[16]

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mun, JJ.); *id.* at 4901 (opinion of Powell, J.). As we have shown above, a remedy for the effects of past discrimination which results in a not unreasonable amount of reverse discrimination is not unconstitutional. *See, e.g.*, Franks v. Bowman Transportation Co., *supra*. *See also* Acha v. Beame, *supra*; United States v. Sheet Metal Workers Local 36, 416 F.2d 123 (8th Cir. 1969). The effect here is minimal when compared with Rios v. Enterprise Ass'n Steamfitters Local Union 638, 501 F.2d 622 (2d Cir. 1974), which upheld an order to a union to admit minority applicants to an apprenticeship program in sufficient numbers to achieve a goal of 30 percent nonwhite membership.

16 In Wright Farms Constr., Inc. v. Kreps, *supra*, the court made a specific finding that Vermont had a small minority population, and therefore held the MBE provision unconstitutional as applied to contractors in that state. However, Congress clearly manifested its intent that the set-aside provision should not apply in such a case. See 123 Cong. Rec. 1437 (daily ed. Feb. 24, 1977), *reprinted* in Associated Gen. Contractors v. Secretary of Commerce, *supra*, 441 F. Supp. at 998-99 (Appendix C), where Representative Mitchell, the sponsor of the amendment, engaged in the following colloquy with Representative Kazen:

"Mr. Kazen: All right. What happens in the rural areas where there are no minority enterprises? Will the 10 percent be held up in order to bring minority enterprises from somewhere else where there is no unemployment into a place where there is unemployment and there is no minority enterprise?

"Mr. Mitchell of Maryland: In response to the gentleman's question, the answer is 'No.'

" . . .

" . . . Let me tell the gentleman why that would not occur. When Presidents Nixon and Ford put out their Executive orders to all the agencies to utilize minority contractors, the agencies then established certain guidelines which said, all right, we will utilize these minority contractors wherever possible, but where there are none, there can be no utilization, and therefore no project should be delayed.

"For example, I would not expect to take my minority contractors from Maryland into Idaho to meet that State's requirement. That will not be an issue.

"Mr. Kazen: If the gentleman would yield further, this is what I wanted the gentleman to clarify, that where there are no minority enterprise contractors [then] this provision would not be in effect; am I correct?

"Mr. Mitchell of Maryland: That is absolutely correct, and that is done by administrative action already on the books with all of the agencies.

"Mr. Kazen: Does the gentleman's amendment leave room for that type of discretion in the Secretary?

"Mr. Mitchell of Maryland: I assume that it does. It would be my intent that it would because that is existing administrative law."

As Representative Mitchell amplified further, 123 Cong. Rec. 1438, *reprinted* in 441 F. Supp. at 1000:

" . . . I reiterate what I said earlier, that we already have in existence within the agency structure the SOP administrative law that says this kind of amendment would not apply where there are no minority contractors or where there are no minorities. It is already in the law."

Both the Third and the Sixth Circuits have upheld the constitutionality of the MBE amendment. *Constructors Association* v. *Kreps*, 573 F.2d 811 (3d Cir. 1978); *Ohio Contractors Association* v. *Economic Development Administration*, —— F.2d ——, No. 78-3053 (6th Cir. July 7, 1978). We agree with their decisions that section 103(f)(2) of the Public Works Employment Act of 1977, 42 U.S.C. § 6705(f)(2), is not unconstitutional.

The judgment is affirmed.

PUBLIC WORKS EMPLOYMENT ACT OF 1977

CHAPTER 80—PUBLIC WORKS EMPLOYMENT

SUBCHAPTER I—LOCAL PUBLIC WORKS

§ 6701. Definitions

As used in this subchapter, the term—

(1) "Secretary" means the Secretary of Commerce, acting through the Economic Development Administration.

(2) "State" includes the several States, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Trust Territory of the Pacific Islands.

(3) "local government" means any city, county, town, parish, or other political subdivision of a State, and any Indian tribe.

(4) "public works project" includes a project for the transportation and provision of water to a drought-stricken area.

As amended Pub.L. 95–28, Title I, § 102, May 13, 1977, 91 Stat. 116.

1977 Amendment. Par. (2). Pub.L. 95-28, § 102(a), added reference to the Trust Territory of the Pacific Islands.

Par. (4). Pub.L. 95-28, § 102(b), added par. (4).

Short Title of 1977 Amendment. Section 101 of Pub.L. 95-28 provided that: "This title [amending this section and sections 6702, 6703, 6707, 6708, and 6710 of this title and enacting provisions set out as notes under this section] may be cited as the 'Public Works Employment Act of 1977'."

Public Works Investment Study; Preliminary Report; Final Report Within 30 Months After May 13, 1977. Section 110 of Pub.L. 95-28 provided that:

"The Secretary of Commerce is authorized and directed to study public works investment in the United States and the implications for the future of recent trends in such investment.

"(b) The study authorized by this section shall include, but not be limited to, the following:

"(1) The historical scope and nature of public works investment, including—

"(A) shifts in the types of public facilities constructed over the last thirty years and the implications of such shifts;

"(B) the patterns of regional distribution of investment;

"(C) the role of the Federal Government, States and local communities in funding public facilities;

"(D) the impact upon unemployment in minority groups.

"(2) The proportion of the gross national product devoted to public works investment over the last thirty years.

"(3) Methods by which the aggregate need for public works can be determined.

"(4) How public works are financed and how financing arrangements affect the pattern and type of investment.

"(5) The level of maintenance or renovation of existing public facilities needed, compared to that provided.

"(c) The Secretary of Commerce shall submit to Congress a report with respect to its findings and recommendations no later than eighteen months after the date of enactment of this section [May 13, 1977]. A preliminary report putting forth the study design shall be submitted to Congress within four months after the date of enactment of this section [May 13, 1977]."

42 § 6705 PUBLIC HEALTH AND WELFARE

§ 6705. Limitations on use of grants

[See main volume for text of (a) to (d)]

Performance of projects by State or local governments prohibited; competitive bidding; illegal aliens

(e)(1) No part of the construction (including demolition and other site preparation activities), renovation, repair, or other improvement of any public works project for which a grant is made under this chapter after May 13, 1977, shall be performed directly by any department, agency, or instrumentality of any State or local government. Construction of each such project shall be performed by contract awarded by competitive bidding, unless the Secretary shall affirmatively find that, under the circumstances relating to such project, some other method is in the public interest. Contracts for the construction of each project shall be awarded only on the basis of the lowest responsive bid submitted by a bidder meeting established criteria of responsibility. No requirement or obligation shall be imposed as a condition precedent to the award of a contract to such bidder for a project, or to the Secretary's concurrence in the award of a contract to such bidder, unless such requirement or obligation is otherwise lawful and is specifically set forth in the advertised specifications.

(2) No grant shall be made under this chapter for any local public works project unless the State or local government applying for such grant submits with its application a certification acceptable to the Secretary that no contract will be awarded in connection with such project to any bidder who will employ on such project any alien in the United States in violation of the Immigration and Nationality Act or any other law, convention, or treaty of the United States relating to the immigration, exclusion, deportation, or expulsion of aliens.

Use of products made in the United States; minority business enterprises

(f)(1)(A) Notwithstanding any other provision of law, no grant shall be made under this chapter for any local public works project unless only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, and supplies mined, produced, or manufactured, as the case may be, in the United States, will be used in such project.

(B) Subparagraph (A) of this paragraph shall not apply in any case where the Secretary determines it to be inconsistent with the public interest, or the cost to be unreasonable, or if articles, materials, or supplies of the class or kind to be used or the articles, materials, or supplies from which they are manufactured are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

(2) Except to the extent that the Secretary determines otherwise, no grant shall be made under this chapter for any local public works project unless the applicant gives satisfactory assurance to the Secretary that at least 10 per centum of the amount of each grant shall be expended for minority business enterprises. For purposes of this paragraph, the term

"minority business enterprise" means a business at least 50 per centum of which is owned by minority group members or, in case of a publicly owned business, at least 51 per centum of the stock of which is owned by minority group members. For the purposes of the preceding sentence, minority group members are citizens of the United States who are Negroes, Spanish-speaking, Orientals, Indians, Eskimos, and Aleuts.

Accessibility standards for handicapped and elderly

(g) No grant shall be made under this chapter for any project for which the applicant does not give assurances satisfactory to the Secretary that the project will be designed and constructed in accordance with the standards for accessibility for public buildings and facilities to the handicapped and elderly under the Act entitled "An Act to insure that certain buildings financed with Federal funds are so designed and constructed as to be accessible to the physically handicapped", approved August 12, 1968. The Architectural and Transportation Barriers Compliance Board established by the Rehabilitation Act of 1973 is authorized to insure that any construction and renovation done pursuant to any grant made under this chapter complies with the accessibility standards for public buildings and facilities issued under the Act of August 12, 1968.
As amended Pub.L. 95–28, Title I, § 103, May 13, 1977, 91 Stat. 116.

References in Text. The Immigration and Nationality Act, referred to in subsec. (e)(2), is Act June 27, 1952, c. 477, 66 Stat. 163, which is classified to section 1101 et seq. of Title 8, Aliens and Nationality.

The Act of August 12, 1968, entitled "An Act to insure that certain buildings financed with Federal funds are so designed and constructed as to be accessible to the physically handicapped", referred to in subsec. (g), is Pub.L. 90-480, Aug. 12, 1968, 82 Stat. 718, which is classified to section 4151 et seq. of this title.

The Architectural and Transportation Barriers Compliance Board established by the Rehabilitation Act of 1973, referred to in subsec. (g), was established under section 502 of that Act (Pub.L. 93-112, Title V, § 502, Sept. 26, 1973, 87 Stat. 391) which is classified to section 792 of Title 29, Labor.

1977 Amendment. Subsecs. (e)–(g). Pub.L. 95-32 added subsecs. (e) to (g).

§ 6705. Implementing rules, regulations, and procedures; criteria; employment of disabled and Vietnam-era veterans; determination of applications for grants

The Secretary shall, not later than thirty days after July 22, 1976, prescribe those rules, regulations, and procedures (including application forms) necessary to carry out this chapter. Such rules, regulations, and procedures shall assure that adequate consideration is given to the relative needs of various sections of the country. The Secretary shall consider among other factors (1) the severity and duration of unemployment in proposed project areas, (2) the income levels and extent of underemployment in proposed project area, and (3) the extent to which proposed projects will contribute to the reduction of unemployment. The Secretary, in consultation with the Secretary of Labor, and consistent with existing applicable collective bargaining agreements and practices, shall promulgate regulations to assure special consideration to the employment in projects under this chapter of qualified disabled veterans (as defined in section 2011(1) of Title 38) and qualified Vietnam-era veterans (as defined in section 2011(2)(A) of such Title 38). The Secretary shall make a final determination with respect to each application for a grant submitted to him under this chapter not later than the sixtieth day after the date he receives such application. Failure to make such final determination within such period shall be deemed to be an approval by the Secretary of the grant requested. For purposes of this section, in considering the extent of unemployment or underemployment, the Secretary shall consider the amount of unemployment or underemployment in the construction and construction-related industries.
As amended Pub.L. 95–28, Title I, § 104, May 13, 1977, 91 Stat. 117.

1977 Amendment. Pub.L. 95-28 directed the Secretary to promulgate regulations to assure special consideration to the employment in projects of qualified disabled veterans and qualified Vietnam-era veterans.

§ 6707. Priority and amounts of projects

Allocation of appropriated funds; Indian tribes and Alaska Native villages; prior applications; unemployment ratio; limits on grants for any one State; territories

(a) The Secretary shall allocate funds appropriated after May 13, 1977, under section 6710 of this title as follows:

(1) 2½ per centum of such funds shall be set aside and shall be expended only for grants for public works projects under this chapter to Indian tribes and Alaska Native villages. None of the remainder of such funds shall be expended for such grants to such tribes and villages.

(2) After the set aside required by paragraph (1) of this subsection, $70,000,000 shall be set aside and expended only for grants for any public works project the application for a grant for which was made under this chapter after July 22, 1976, and before December 24, 1976, and which application was not received, was not considered, or was rejected solely because of an error by an officer or employee of the United States. Any allocation made to an applicant pursuant to regulation shall be reduced by the amount of any grant made to such applicant under this paragraph.

(3) After the set asides required by paragraphs (1) and (2) of this subsection, 65 per centum of such funds shall be allocated among the States on the basis of the ratio that the number of unemployed persons in each State bears to the total number of unemployed persons in all the States and 35 per centum of such funds shall be allocated among those States with an average unemployment rate for the preceding twelve-month period in excess of 6.5 per centum on the basis of the relative severity of unemployment in each such State, except that (A) no State shall be allocated less than three-quarters of one per centum or more than 12½ per centum of such funds for local public works projects within such State, except that in the case of Guam, the Virgin Islands, American Samoa, and the Trust Territory of the Pacific Islands, not less than one-half of one per centum in the aggregate shall be granted for such projects in all four of these jurisdictions, and (B) no State whose unemployment data was converted for the first time in 1976 to the benchmark data of the current population survey annual average compiled by the Bureau of Labor Statistics shall receive a percentage of such funds less than the percentage of funds allocated to such State under this chapter from funds appropriated to carry out this chapter prior to May 13, 1977.

Local government projects; energy conservation; endorsement of project by general purpose local government; projects requested by school districts

(b)(1) In making grants under this chapter, the Secretary shall give priority and preference to public works projects of local governments.

(2) In making grants for projects for construction, renovation, repair, or other improvement of buildings, the Secretary shall also give consideration as between such building projects to those projects which will result in conserving energy, including, but not limited to, projects to redesign and retrofit existing public facilities for energy conservation purposes, and projects using alternative energy systems.

(3) In making grants under this chapter, the Secretary shall also give priority and preference to any public works project requested by a State or by a special purpose unit of local government which is endorsed by a general purpose local government within such State.

(4) A project requested by a school district shall be accorded the full priority and preference to public works projects of local governments provided in paragraph (1).

Unemployment rates; priority; States receiving minimum allocations

(c) In making grants under this chapter, if for the twelve most recent consecutive months, the national unemployment rate is equal to or exceeds 6½ per centum, the Secretary shall (1) expedite and give priority to applications submitted by States or local governments having unemployment rates for the twelve most recent consecutive months in excess of the national unemployment rate and (2) shall give priority thereafter to applications submitted by States or local governments having unemployment rates for the twelve most recent consecutive months in excess of 6½ per centum, but less than the national unemployment rate. Information regarding unemployment rates may be furnished either by the Federal Government, or by States or local governments, provided the Secretary determines that the unemployment rates furnished by States or local governments are accurate, and shall provide assistance to States or local governments in the calculation of such rates to insure validity and standardization. The Secretary may waive the application of the first sentence of this subsection to any State which receives a minimum allocation pursuant to paragraph (3) of subsection (a) of this section.

Priorities for projects in State or localities with two or more projects

(d) Whenever a State or local government submits applications for grants under this chapter for two or more projects, such State or local government shall submit as part of such applications its priority for each such project.

Community or neighborhood basis of unemployment rates

(e) The unemployment rate of a local government shall, for the purposes of this chapter, and upon request of the applicant, be based upon the unemployment rate of any community or neighborhood (defined without regard to political or other subdivisions or boundaries) within the jurisdiction of such local government, except that any grant made to a local government based upon the unemployment rate of a community or neighborhood within its jurisdiction must be for a project to be constructed in such community or neighborhood.

(f) Repealed. Pub.L. 95–28, Title I, § 107(e), May 13, 1977, 91 Stat. 119.

Criteria for requests

(g) States and local governments making application under this chapter should (1) relate their specific requests to existing approved plans and programs of a local community development or regional development nature so as to avoid harmful or costly inconsistencies or contradictions; and (2) where feasible, make requests which, although capable of early initiation, will promote or advance longer range plans and programs.

Applications not submitted on or before December 23, 1976; grants prohibited; exceptions

(h)(1) Except as provided in paragraph (2) of this subsection, the Secretary shall not consider or approve or make a grant for any project for which any application was not submitted for a grant under this chapter on or before December 23, 1976.

(2) The Secretary may receive applications for grants for projects under this chapter—

(A) from the Trust Territory of the Pacific Islands;

(B) from Indian tribes and Alaska Native villages;

(C) from any applicant to use any allocation which may be made pursuant to regulation, to the extent necessary to expend such allocation, if a sufficient number of applications were not submitted on or before December 23, 1976, to use such allocation.

Substitution of projects to alleviate drought or other emergency or disaster-related conditions or damage

(i) The Secretary may allow any applicant which has received a grant for a project under this chapter to substitute one or more projects for such project if in the judgment of the Secretary (1) the Federal cost in the aggregate of such substituted project or projects does not exceed such grant, (2) such substituted project or projects comply with section 6705 (d) of this title, and (3) such substituted project or projects will in fact aid in alleviating drought or other emergency or disaster-related conditions or damage. Section 6705(a) of this title shall not apply to projects substituted under this subsection.

Private nonprofit health care or rehabilitation facilities

(j) Notwithstanding subsection (h)(1) of this section, grants may be made from appropriations made under section 6710 of this title after September 30, 1977, to States or local governments for projects for the construction, renovation, repair, or other improvements of health care or rehabilitation facilities owned and operated by private nonprofit entities.

As amended Pub.L. 95–28, Title I, §§ 105–107, May 13, 1977, 91 Stat. 117, 118.

1977 Amendment. Subsec. (a). Pub.L. 95-28, § 105, added par. (1) and the introductory provisions preceding par. (1), par. (2), and, in par. (2), the introductory provisions preceding cl. (A) and cl. (B), designated existing provisions as cl. (A) of par. (2) and, in such cl. (A) as so designated added reference to the Trust Territory of the Pacific Islands and substituted "three-quarters of one percentum" for "one-half of one percentum" and "of such funds" for "of all amounts appropriated to carry out this subchapter".

Subsec. (b). Pub.L. 95-28, § 105, designated existing provisions as par. (1) and added pars. (2) to (4).

Subsec. (c). Pub.L. 95-28, § 107(a), (b), substituted "twelve most recent consecutive months" for "three most recent consecutive months" and authorized the Secretary to waive the application of the first sentence of the subsection to any State which receives a minimum allocation pursuant to subsec. (a)(3) of this section.

Subsec. (d). Pub.L. 95-28, § 107(c), substituted provisions directing State or local governments that submit two or more projects to submit as part of their applications the priorities assigned to each project for provisions directing that seventy percentum of all amounts appropriated to carry out this chapter be granted for public works projects submitted by State or local governments given priority under clause (1) of the first sentence of subsec. (c) of this section, with the remaining thirty percentum available for public works projects submitted by State or local governments in other classifications of priority.

Subsec. (e). Pub.L. 95-28, § 107(d), substituted "to be constructed in such community or neighborhood" for "of direct benefit to, or provide employment for, unemployed persons who are residents of that community or neighborhood".

Subsec. (f). Pub.L. 95-28, § 107(e), struck out subsec. (f) which directed that, in determining the unemployment rate of a local government for purposes of this section, the unemployment in those adjoining areas from which the labor force for such project might be drawn were to be taken into consideration.

Subsecs. (h)-(j). Pub.L. 95-28, § 107(f), added subsecs. (h) to (j).

§ 6708. Wage standards for laborers and mechanics; enforcement

All laborers and mechanics employed on projects assisted by the Secretary under this chapter shall be paid wages at rates not less than those prevailing on similar construction in the locality as determined by the Secretary of Labor in accordance with the Davis-Bacon Act, as amended. The Secretary shall not extend any financial assistance under this chapter for such project without first obtaining adequate assurance that these labor standards will be maintained upon the construction work. The Secretary of Labor shall have, with respect to the labor standards specified in this provision, the authority and functions set forth in Reorganization Plan Numbered 14 of 1950 (15 F.R. 3176; 64 Stat. 1267), and section 276c of Title 40.

As amended Pub.L. 95-28, Title I, § 108, May 13, 1977, 91 Stat. 119.

1977 Amendment. Pub.L. 95-28 substituted "All laborers and mechanics employed" for "All laborers and mechanics employed by contractors or subcontractors".

§ 6710. Authorization of appropriations

There is authorized to be appropriated not to exceed $6,000,000,000 for the period ending December 31, 1978, to carry out this chapter.

As amended Pub.L. 95-28, Title I, § 109, May 13, 1977, 91 Stat. 119.

1977 Amendment. Pub.L. 95-28 substituted "$6,000,000,000 for the period ending December 31, 1978" for "$2,000,000,000 for the period ending September 30, 1977".

Immediate Initiation of Construction on Certain Projects. Section 111 of Pub.L. 95-28 provided that: "The Secretary of Agriculture and the Secretary of the Interior shall immediately initiate the construction of those Federal public works projects (A) which are the responsibility of their respective departments, (B) which have been authorized, and (C) which can be commenced within 60 days of the date of enactment of this section [May 13, 1977] and completed no later than the 180th day after commencement of construction. No funds authorized by section 111 of the Local Public Works Capital Development and Investment Act of 1976 (Public Law 94-369) [this section] may be used to carry out this section."